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APPENDIX "A"

(Tr. 1, 2 and 3)

TRANSCRIPT OF RECORD OF PROCEEDINGS

On the 25th day of July, 1957, the County Solicitor filed, in words and figures, the following Information:

CASE NO. 46162

IN THE CRIMINAL COURT OF RECORD OF THE COUNTY OF HILLSBOROUGH AND STATE OF FLORIDA

The 25th day of July, June Term, 1957.

THE STATE OF FLORIDA	DIRECT
vs.	INFORMATION FOR
CIRO BEDAMI	CONSPIRACY
JOSEPH BEDAMI	GRAND LARCENY

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

HARRY M. HOBBS, Acting County Solicitor for the County of Hillsborough, CHARGES that CIRO BEDAMI and JOSEPH BEDAMI of the County of Hillsborough and State of Florida, on the 21st day of March, 1957, in the County and State aforesaid, did unlawfully conspire, combine, confederate and agree together to unlawfully and feloniously take, steal and carry away certain property, to-wit: cash, a further description of which is to the Solicitor unknown, of the value of One Thousand Fifty Dollars ($1050), in money current in the United States of America, the property of DEPENDABLE INSURANCE COMPANY, INC., a Corporation,

2ND COUNT:

HARRY M. HOBBS, Acting County Solicitor for the County of Hillsborough CHARGES that CIRO BEDAMI and JOSEPH BEDAMI of the County of Hillsborough and State of Florida, on the 21st day of March, 1957, in the County and State aforesaid, did unlawfully and feloniously take, steal and carry away certain property, to-wit: cash, a further description of which is to the Solicitor unknown, of the value of One Thousand Fifty Dollars ($1050), in money current in the United States of America, the property of DEPENDABLE INSURANCE COMPANY, INC., a Corporation, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

s/ Harry M. Hobbs

Acting County Solicitor, Hillsborough County, Florida.

STATE OF FLORIDA,
COUNTY OF HILLSBOROUGH.

Personally appeared before me, HARRY M. HOBBS, Acting County Solicitor for Hillsborough County, Florida who, being first duly sworn, says that the allegations as set forth in the foregoing INFORMATION are based upon the facts that have been sworn to as true, and which, if true, would constitute the offense therein charged.

s/ Harry M. Hobbs

Acting County Solicitor, Hillsborough County, Florida.

Sworn to and subscribed before me this 25 day of July, A. D. 1957.

By s/ Miriam K. Brown

(SEAL) Notary Public, State of Florida at Large
My commission expires June 25, 1960.

WITNESSES FOR STATE

Joseph Alvarez, Atlantic Discount Company, 2708 Florida Avenue, Tampa, Florida.

Oscar Bonis, Broadway National Bank, 1701 E. Broadway, Tampa, Florida.

Angelo Traina, 3426 Fifteenth Street, Tampa, Florida.

Pete Rumore, Columbia Body Shop, Seventh Avenue and Twenty-Fourth Street, Tampa, Florida.

Joe Castellano, Columbia Body Shop, Seventh Avenue and Twenty-Fourth Street, Tampa, Florida.

Jimmie Rumore, Midway Garage, 2107 East Chelsea, Tampa, Florida.

Frese and Breslin, Police Department, Tampa, Florida.

Raymond N. Byers, F.B.I., P. O. Box 2091, Sarasota, Florida:

John Froment Gonzalez, 1009 Peninsula, Tampa, Florida.

B. A. Hogan, 3506 Twenty-Third Avenue, Tampa, Florida.

Lawton, P.D.

Presented by HARRY M. HOBBS, Acting County Solicitor and filed this July 25, 1957. L. D. SIMMONS, Clerk of the Criminal Court of Record, Hillsborough County, Florida.

By s/ Lorene Hancock
Deputy Clerk

APPLICATION FOR SUBPOENA DUCES TECUM

(Tr. 358-364)

COME NOW the defendants, CIRO BEDAMI and JOSEPH BEDAMI, and respectfully move this Honorable Court for the issuance of a Subpoena Duces Tecum to be directed to the Honorable Paul B. Johnson, his assistants, reporters, secretaries or other employees, as custodian of the below described stenographic notes and transcription thereof, and in support of said motion, respectfully show unto the Court the following:

1. That on or before the 25th day of July, 1957, the Honorable Harry M. Hobbs, acting County Solicitor, of Hillsborough County, Florida, acting in and for the body of Hillsborough County, Florida, as a one man grand jury, did conduct an investigation into the alleged offense of conspiracy to commit grand larceny and grand larceny allegedly committed by these defendants as charged in the Information filed against them in the above entitled cause.

2. That as shown by the Information against these defendants, a true and correct photostatic copy of which is attached hereto, and made a part hereof and marked defendants' Exhibit "A", the said Harry M. Hobbs, acting County Solicitor, did cause to appear before him, as a witness for the State, one Angelo Traina. That the said Angelo Traina did duly appear before the said acting County Solicitor and did testify to material facts concerning the alleged offense charged against these defendants in the Information in the above entitled cause. That the testimony of the said Angelo Traina was duly taken down stenographically by one of the reporters

or secretaries employed by the County Solicitor of Hillsborough County, Florida, and that said testimony has been duly transcribed and is now in the possession of the said Paul B. Johnson, his assistants, reporters, secretaries or other employees.

3. That these defendants have not received a preliminary hearing at which they could examine the witnesses for the State for the reason that the said Harry M. Hobbs, as acting County Solicitor, did on the 25th day of July, 1957, file a Direct Information against these defendants in the above entitled cause and that these defendants were thereafter arrested on said charges for the first time on a capias issued on said Information.

4. That these defendants are at present on trial before the said Criminal Court of Hillsborough County, Florida, upon said Information consisting of two counts charging these defendants with conspiracy to commit grand larceny and the commission of grand larceny.

5. That the State of Florida, has placed upon the stand in said trial, which is now in progress against these defendants, the said Angelo Traina. That the State has been allowed on direct examination to examine said witness about all of the transactions involved in said conspiracy and larceny charges which are within said witnesses knowledge and which the State decided to interrogate said witness about.

6. That the defendants have been informed by certain persons who have talked to the said Angelo Traina, since he appeared before the said Harry M. Hobbs as acting County Solicitor, that his testimony before the said Harry M. Hobbs would be different from and in material conflict with the testimony he would give on direct examination at the trial of this cause.

7. That based upon information received by them, these defendants verily believe and allege that the said Angelo Traina's testimony as given before the said Harry M. Hobbs, as acting County Solicitor, while acting as a one man grand jury, on behalf of Hillsborough County, Florida, was different from, and in material and substantial conflict with the explanatory of the testimony the said witness has given before the jury on direct examination in this cause.

8. That it is imperative and of paramount importance as well as indispensible to the administration of justice that these defendants have made available to them and their counsel the testimony of the said Angelo Traina as given before the said Harry M. Hobbs, acting County Solicitor, on or before July 25, 1957, as shown by the stenographic notes and transcription thereof now in the custody and possession of the said Paul B. Johnson, his assistants, reporters, secretaries, or other employees; that it is imperative that defendants and their counsel be fully advised and have access to said testimony as aforesaid for the purpose of ascertaining whether it is consistent with that of the witness given before this Court on direct examination, and in order that defendants' counsel at this trial may be enabled to properly cross-examine said witness, and if said testimony as given before the said Harry M. Hobbs as acting County Solicitor is found to be inconsistent with or explanatory of the testimony as given on direct examination at this trial, be enabled to lay a proper predicate for impeachment of said witness, and defendants are entitled to this in the furtherance of justice, because it is the only manner and means by which these defendants and their counsel can be advised or ascertain whether the testimony as given by this witness before the said Harry M. Hobbs, as acting County Solicitor, is consistent with the testimony given by him on direct

examination, and if inconsistent these defendants, without the granting of this motion will be denied and deprived of their right to lay any foundation for the impeachment of said witness and will be denied and deprived their rights under Section 11 of the Declaration of Rights of the Florida Constitution as well as due process of law and the equal protection of law as guaranteed by the Fourteenth Amendment to the Federal Constitution. and their rights as set out in the case of *Van vs. State*, 85 So. 2nd. 133; *State Ex Rel Brown vs. Dewell*, 133 Fla. 785, 167 So. 687; *U.S. vs. Aaron Burr*. Federal Cases No. 14, 692 d; and the case of *Trafficante vs. State*, 92 So. 2nd 811.

WHEREFORE, defendants respectfully pray that this Honorable Court enter an Order directing the Clerk to issue a Subpoena Duces Tecum directed to the said Paul B. Johnson, his assistants, reporters, secretaries or other employees who have custody and control of the stenographic notes and transcription thereof of testimony of said Angelo Traina as given before the said Harry M. Hobbs, acting County Solicitor, on or before July 25, 1957, requiring him or them to personally appear as a witness on behalf of the defendants, instanter, and to produce as said witness or witnesses all of the stenographic notes and all of the transcription thereof of the testimony of the said Angelo Traina as given and testified to before the said Harry M. Hobbs, acting County Solicitor, in his investigation of the charges against these defendants as embraced in the pending information, on or before July 25, 1957, wherein he testified concerning the alleged offense against these defendants of conspiracy to commit larceny and grand larceny and any said stenographic notes and transcription thereof so produced, be made available to defendants and their counsel, and defendants do pray that this Court

will issue or cause the Clerk of this Court to issue this praecipe requiring the presence of this witness or witnesses, as well as the production of the said notes and transcription thereof in the form as shown by the copy of the Subpoena Duces Tecum hereto attached, which is prescribed as the proper form by the Statutes of Florida and such compulsory process.

/s Ciro Bedami
CIRO BEDAMI
s/ Joseph Bedami
JOSEPH BEDAMI

s/ Frank Ragano
FRANK RAGANO
s/ Mark R. Hawes
MARK R. HAWES
Counsel for Defendants
308 Tampa Street
Tampa 2, Florida

PERSONALLY CAME before the undersigned officer duly authorized to administer oaths, CIRO BEDAMI AND JOSEPH BEDAMI, each of whom being first duly sworn depose and say, each for himself, that he is a defendant named in and interposing the foregoing Application for Subpoena Duces Tecum; that the matters and things therein set forth and stated are true.

s/ Ciro Bedami
CIRO BEDAMI
(SEAL) s/ Joseph Bedami
JOSEPH BEDAMI

Sworn to and Subscribed before me
this 17th day of October, A.D. 1957.
s/ Virginia Toffaletti
NOTARY PUBLIC
Notary Public, State of Florida at Large
My Commission expires July 12, 1960.
Bonded by Mass. Bonding & Insurance Co.

EXCERPTS FROM TESTIMONY OF ANGELO TRAINA

(Tr. 8)

Q Now, Mr. Traina, were you subpoenaed to the County Solicitor's office on April 18, 1957, to give testimony?

A Yes, sir.

Q All right. Were you subpoenaed again to appear on July 9, 1957?

A I think I was.

Q Now, just before your second appearance in the office of the County Solicitor and after you had already testified to us under oath in April, did you have a phone call from Joe Bedami?

A Yes, sir.

• • • •

(Tr. 8)

Q He discussed what you had testified to about Joe Bedami in the County Solicitor's office?

A Yes, sir.

• • • •

(Tr. 8)

Q Now, Mr. Traina, the day before you were to appear in the Solicitor's Office the second time, on July 9, 1957, please relate to the Jury about this telephone call you had and conversation with Joe Bedami.

(Tr. 9)

Q You received a telephone call before you appeared in the County Solicitor's office the second time?

A Yes.

• • • •

(Tr. 9 through 14)

MR. JOHNSON: Okay. You may examine.

MR. HAWES: Miss Toffaletti—you two boys come over here—would you please acknowledge this signature of these two defendants to this document here?

MR. JOHNSON: Is this a part of the cross examination? I have submitted him for cross examination.

MR. HOBBS: If they are going to do notary work, do it out of the presence of the Jury. If they have to sign a paper, I don't see why they have to do it in the presence of the Court.

THE COURT: I assume it has something to do with the proceeding.

MR. HAWES: It does, your Honor. I assure you it's perfectly proper.

MR. JOHNSON: I assume I am going to have a copy of that.

MR. HOBBS: Judge, if the Jury is going to be present and they are going to hand documents around, I think they ought to give them to the Jury, then.

MR. JOHNSON: I suggest that the Jury be withdrawn.

MR. HAWES: I would be glad for the Jury to have this document.

MR. HOBBS: Let's give it to the Jury, then. Hand it to the Jury then. Put it in evidence.

THE COURT: Let the Jury be withdrawn.
(The Jury was withdrawn)

MR. HAWES: Judge, this is a sworn application for a subpoena duces tecum.

THE COURT: To whom is it directed?

MR. HAWES: Judge, here is the proposed subpoena in the form that the Statute requires and the reason, your Honor, that I had to interrupt the proceedings here is that this motion sets up that this witness has testified in chief. I could not file this motion and it could not be sworn to by the defendants until after his testimony in chief. What we are seeking here, your Honor, is that the transcription and the original stenographic notes of the witness, Mr. Traina, when he was before the County Solicitor, or his assistant, when the assistant was performing his investigative functions in this case, acting as a one-man grand jury, when he was investigating the case against these defendant here.

We have cited there to the Court the authority under which we are moving. I think we are clearly entitled to it under the law before we undertake the cross examination of this witness. As a matter of fact, that was the only question except for grand jury testimony, except for the County Solicitor's investigating as a one-man grand jury in the Henry Trafficante case, that was the only question raised and decided in that Court in that case.

MR. JOHNSON: Judge, this has never been done in the entire history of the jurisprudence in the State of Florida. It's absolutely without precedence. What counsel is attempting to do is to bring my private notes in, the work-product of my mind and my associate counsel, and bring in our memoranda preparatory to trying this case. It's highly improper. There is no authority whatsoever in the entire history of the State of Florida for such a procedure as this and it's particularly, I submit to the Court, improper to interrupt the examination of this witness in the presence of the Jury, go through all this routine and circus act treatment, taking the court reporter away to notarize these applications in the presence of the Jury.

We submit to your Honor this has no place in this proceeding. It's wholly without precedent and it's highly improper. He can't get these notes any more than I can reach in his file and take his private notes and memorandum made by him and preparatory to trying this case. There certainly is no analogy between this and the grand jury. This has never been done in the State of Florida.

THE COURT: On what theory—first of all, what is it that you want?

MR. HAWES: I want the stenographic notes and the transcription thereof, your Honor, of the testimony of Angelo Traina as given before the County Solicitor or his assistants when he was subpoenaed up there before him on or before July 25, 1957; and the proceeding in which the Solicitor or his assistants was acting as a one-man grand jury investigating to determine whether or not they would file an information against these defendants charging them with this offense. Now, that is the stenographic notes and the transcript of the witness's testimony in that proceeding, is what we seek. I say it's comparable to grand jury testimony.

THE COURT: Of all of the witnesses?

MR. HAWES: This witness, Mr. Traina, Judge.

MR. JOHNSON: Judge, there is no authority in the laws of the State of Florida for this going in my file.

THE COURT: For what purpose do you propose to—

MR. HAWES: As we have set up, your Honor—

THE COURT: I haven't read that thing. It's too long. I don't intend to read it.

MR. HAWES: Well, as we set up in there, your Honor, we are informed by people who have talked to this witness since this information was filed and believe on that information that his testimony here before this petty Jury will differ from the testimony he gave before the County Solicitor on that investigation, in material aspects. We seek the stenographic notes and the transcription thereof before we undertake the cross examination of this witness to determine whether or not

it is consistent, in fact, and if not, that we may be enabled to lay the predicate and foundation for his impeachment and be guided in our cross examination of the witness.

MR. JOHNSON: Judge, the law in the case of Whitaker vs. Blackburn has a long dissertation on this same subject, that they are no more entitled to invade my private files, to go into my private notes and memorandum and other notes made by us or through our associate counsel or with our stenographic help, that we are entitled to compel them to relinquish to us, as attorneys, their notes and memorandum made in the preparation of this trial. It's just not proper. There is no authority for it and it would be a matter which would totally handicap us as attorneys representing the State of Florida preparing any case when we know that if we put anything in our file, they can reach around and get it. It just ain't right and there is no law for it and the Whitaker versus Blackburn case is clearly authority to the contrary to their position that they are maintaining. This has never been done in the State of Florida, Judge. I can confidently assert that because I have done research on this when the Whitaker versus Blackburn case came up.

THE COURT: Well, it seems to be a straw in the wind, or something of that similar character, growing out of a lot of screwball decisions made by the U. S. Supreme Court in this particular. I don't mean that they are all screwball, only in this particular, but in this particular, at this time, it's the only one we are talking about. It's, I think, bad law. I know of no authority in the State of Florida to support it and I'm not going to consciously create what I believe to be bad law. Now, I may create a lot of it but I don't create it with a view to it being bad and I don't think it's bad. I don't

think this is a proper proceeding at all and it's one to which I won't give my countenance until higher authority compels me to do so.

MR. HAWES: Now, your Honor has then, as I understand it, denied the application for the subpoena?

THE COURT: I was just studying whether I would deny the application for the subpoena or let it issue and then refuse to enforce it.

MR. HAWES: It's all the same, Judge.

MR. RAGANO: It would be tantamount to the same thing.

THE COURT: When you are dealing with a bunch of hair splitters, you can't ever tell.

MR. JOHNSON: I think the Court in its discretion can refuse to issue any subpoena duces tecum and can direct the Court not to. I think, if the Court did have a subpoena duces tecum issued, the Court might be tacitly giving its approval to this novel, unusual approach by Mr. Hawes to the law, which is wholly without precedent except in Mr. Hawes' fertile mind.

THE COURT: Well, since I don't intend to walk the last mile, I guess I won't walk the first. We will just deny your application for the subpoena.

MR. HAWES: And, your Honor, of course, we could apply to the Clerk, but we've applied to the Court and I assume that your Honor means for the Clerk not to issue the subpoena, being you have declined to issue it, yourself.

THE COURT: I so instruct him if permission is asked to do it.

Now, will you go back and pick us up where we left off and—

MR. JOHNSON: I have tendered the witness, Judge, for cross examination when all this upheaval and uproar commenced.

THE COURT: All right, bring back the Jury.
(The Jury returned to the court room)

MOTION FOR NEW TRIAL

(Tr. 379 and 380)

3. The Court erred in denying and overruling defendant's sworn application for a Subpoena Duces Tecum to be directed to Paul B. Johnson, his assistants, reporters, secretaries or other employees who had possession of the stenographic notes and transcription thereof of the testimony of the State Witness, Angelo Traina, as given before the County Solicitor or his assistant when the said Solicitor, or his assistant, was acting as a one man grand jury investigating the charges against these defendants embraced in the pending information; and the Court thereby denied these defendants their right to compulsory process for the attendance of witnesses on their behalf in violation of defendants' constitutional right to compulsory process under the constitution of the State of Florida as well as denied these defendants equal protection of the law and due process of law as guaranteed and protected by the Fourteenth Amendment to the Federal Constitution.

ASSIGNMENTS OF ERROR AND DIRECTIONS TO THE CLERK FOR MAKING UP TRANSCRIPT OF RECORD

(Tr. 385 and 386)

3. The Trial Court erred in denying and overruling defendant's sworn application for a Subpoena Duces Tecum to be directed to Paul B. Johnson, his assistants, reporters, secretaries or other employees who had possession of the stenographic notes and transcription thereof of the testimony of the State Witness, Angelo Traina, as given before the County Solicitor or his assistant when the said Solicitor, or his assistant, was acting as a one man grand jury investigating the charges against this defendant embraced in the pending information; and the Court thereby denied this defendant his right to compulsory process for the attendance of witnesses on his behalf in violation of defendant's constitutional right to compulsory process under the constitution of the State of Florida as well as denied this defendant equal protection of the law and due process of law as guaranteed and protected by the Fourteenth Amendment to the Federal Constitution.

(Tr. 390 through 392)

ORDER ON APPEAL

This is an appeal from the Criminal Court of Record in and for Hillsborough County, Florida, by Joseph Bedami after being convicted on the charge of conspiracy in said Court. The primary question for consideration and the only question argued before the Court or presented in brief filed on behalf of said defendant, in essence, is as follows:

DID THE TRIAL COURT ERR IN DENYING SAID DEFENDANT APPLICATION FOR A SUBPOENA DUCES TECUM TO COMPEL THE PRODUCTION OF STENOGRAPHIC NOTES AND A TRANSCRIPT THEREOF OF A STATEMENT UNDER OATH MADE BY A STATE'S WITNESS UNDER SUBPOENA BEFORE AN ASSISTANT COUNTY SOLICITOR OF HILLSBOROUGH COUNTY?

This Court is of the opinion no error was committed by the trial court in refusing the issuance of such subpoena based upon the sworn application therefor. The material part of the application as a predicate for this decision is as follows:

> "That the defendants had been informed by certain persons who had talked to the said Angelo Traina, since he appeared before the said Harry M. Hobbs as acting county solicitor, that his testimony before the said Harry M. Hobbs would be different from and in material conflict with the testimony he would give on direct examination at the time of the trial of this cause."

No proffer was made to prove these allegations which are purely hearsay at best and no predicate laid by the examination of the witness in question to see if he had made any contradictory statements or had made the alleged statements contained in the application. Also, there is no showing that the defendant had been unable to interrogate the witness even though he had such right under the law. This is not a case where a deposition or transcript was used by the State in examination of the witness in chief. It appears this is nothing more than a fishing expedition and to delay the trial upon such application upon tender of said witness for cross-examination would not be proper. The defendant in this type of action is entitled under the Constitution to every right

to properly present any matters pertaining to his defense, but it should be presented with reasonable diligence and there must be a reasonable basis of relevancy, materiality and veracity.

Inherent in determination of the question before this Court is whether or not any such transcript or depositions taken by the county solicitor in connection with the preparation of his case should be subject to a subpoena duces tecum upon proper application. This Court is cognizant of the fact that the county solicitor has the right to subpoena witnesses to take their testimony. A defendant has the right to interview and interrogate witnesses under the applicable rules of practice of this State. In Smith vs. State, 95 So 2d 525, the court approved the right of defendant's counsel to examine the deposition of a witness taken by the State Attorney when the latter was using the same in attempting to impeach the witness. This Court feels that it would be extending the rule entirely too far if such rule was made applicable to depositions taken by a county solicitor in all instances. Such depositions are more in the nature of private papers or memorandums rather than public or official material subject to compulsory delivery upon demand. In Whitaker v. Blackburn, 74 So 2d 794, such a distinction is made in certain cases therein discussed. See State v. Laird, 79 Kan 681, 100 P 637; People v. Singh, 136 Cal. App. 233, 28 P 2d 416; State v. Rhodes, 81 Ohio St 397, 91 NE 186. See also McAden v. State, 21 So 2d 33, Raulerson, et al, v. State, ——— So 2d ———, Lindberg v. State, 184 So. 662. In the course of an investigation a county solicitor may subpoena and take the deposition or statement, sworn or unsworn of a number of witnesses at various times both before and after an information has been filed. Certainly until such papers are used by the State in

some fashion before the jury, they should not become subject to demand for production. The foregoing rule should be applicable to all such transcripts or memorandums.

The judgment and sentence of the lower court is affirmed.

DONE AND ORDERED in Chambers at Tampa, Hillsborough County, Florida, this 18th day of July, 1958.

s/ James S. Moody
CIRCUIT JUDGE

(Tr. 393 through 397)

PETITION FOR REHEARING

To the Honorable James S. Moody, one of the Judges of the Circuit Court of the Thirteenth Judicial Circuit of the State of Florida, in and for Hillsborough County:

Petitioner, JOSEPH BEDAMI, files this his Petition for Rehearing respectfully requesting this Honorable Court to reconsider its Order on Appeal filed on July 18, 1958, wherein the judgment and sentence of the lower Court was affirmed. As grounds for rehearing, petitioner respectfully suggests the following:

1. On page 2 of this Honorable Court's Order on Appeal it is stated that:

> "This Court feels that it would be extending the rule entirely too far if such rule was made applicable to depositions taken by a county solicitor in all instances. Such depositions are more in the

> nature of *private papers or memorandums rather than public or official material* subject to compulsory delivery upon demand." (Underscoring Supplied).

The Court apparently overlooked the fact that the testimony sought to be compelled was not the private notes or memorandums of the County Solicitor made preparatory to trial, but was the testimony of the witness, Angelo Traina, before the Solicitor when he was acting as a one-man grand jury in an official investigation, inquisitory in nature, to determine whether or not the charges against the petitioner should be filed. That the testimony of the witness before the Solicitor is therefore in precisely the same category as the testimony of a witness before the grand jury, the only distinction being that in the case at Bar the grand jury consists of one man, while in ordinary grand jury proceedings, the grand jury consists of several men. For the purpose of this case, this is a distinction without a difference.

2. We respectfully submit that this Honorable Court apparently overlooked the cases of *State ex rel Brown v. Dewell*, 133 Fla. 785, 167 So. 687; *Trafficante v. State*, 92 So. 2d 811, and *Trafficante v. State*, 92 So. 2d 806, wherein the Supreme Court of Florida, in all three cases just cited approved the application of subpoenas duces tecum reaching testimony to be used for impeaching of the State Witness's testimony when said application was made at the trial when the witness was tendered to the defense for cross-examination, this being the precise procedure followed by counsel for the defense in the instant case in reliance on said three cases.

In the Trafficante case, supra, at page 815 of the text, the Supreme Court of Florida held:

"• • • Appellant's sworn application for the subpoena, as we have stated, sets up the materiality of the evidence sought to be reached by the subpoena and must be taken for the purpose of this appeal as proving materiality to the extent necessary to warrant examination of the transcript by the Court with a view to making final determination of its materiality. See Vann v. State, supra, 85 So. 2d 133, and Coco v. State, Florida, 62 So. 2d 892. • • •

"The right of an accused in a criminal case to compulsory process for attendance of witnesses of his behalf, as we have seen, stems from the express terms of our Constitution. This provision was inserted because of the fundamental unfairness which results from placing a man on trial on a criminal charge and denying him the means to compel the attendance of witnesses, within the jurisdiction of the Court, who are in possession of material facts which show or tend to show his innocence of the charge.

"• • • Very recently, in Vann v. State, supra, 85 So. 2d 133, we had occasion to consider a related problem and we held that it is the duty of the Trial Judge, on proper application, to examine documents sought to be subpoenaed, and to apply tests of relevancy or privilege, which we there stated, in order that an enlightened ruling might be made upon the application. Such procedure was not followed in the instant case."

In the pending case, it was the affirmative duty of the Trial Court to issue the subpoena sought. Upon the production of the testimony, it was the duty of the Trial Judge to examine said testimony to determine any question of relevancy or privilege which the State might raise in regard to said testimony after it was brought into Court. The Trafficante cases, supra, were reversed for the Trial Court's failure so to do, was the Vann case, supra.

WHEREFORE, petitioner prays that this Honorable Court reconsider its Order on Appeal for the reasons above stated and upon the authorities cited.

Respectfully submitted,
HAWES & RAGANO

By s/ Frank Ragano
308 Tampa Street, Tampa, Florida
Attorneys for Appellant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Petition for Rehearing has been furnished to the Honorable James M. McEwen, by mailing a copy of the same to his office in the Court House at Tampa, Hillsborough County, Florida, this the 1st day of August, 1958.

s/ Frank Ragano
Counsel

ORDER DENYING PETITION FOR RE-HEARING

This cause coming on this day to be heard on the Appellant Joe Bedami's petition for re-hearing of the order entered on this appeal on July 18, 1958, and the Court having heard argument of counsel and considered same, it is thereupon

ADJUDGED, ORDERED AND DECREED that the Appellant's petition for re-hearing be and the same is hereby denied.

DONE AND ORDERED in Chambers at Tampa, Florida this 15th day of September, 1958.

s/ James S. Moody
CIRCUIT JUDGE

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT
JANUARY TERM, A. D. 1959

JOE BEDAMI,
Petitioner,
vs.
STATE OF FLORIDA,
Respondent.

CASE NO. 964

Opinion filed April 29, 1959.

Petition for writ of certiorari to the Circuit Court of Hillsborough County; James S. Moody, Judge.

Frank Ragano of Hawes & Ragano, Tampa, for Petitioner

Richard W. Ervin, Attorney General, Edward S. Jaffry, Asst. Atty. Gen., Tallahassee, for Respondent.

ALLEN, J.

The petitioner, Joseph Bedami, in the midst of his trial in the Criminal Court of Record of Hillsborough County, filed a sworn application for a subpoena duces tecum to compel the production of the stenographic notes and transcription of the testimony previously given by the state's witness, Traina, concerning the case before the county solicitor in which the petitioner contends the solicitor was acting in an official

investigation to determine whether or not the charges embraced in the impending information should be filed against petitioner. The application was sworn to and set out in substance that the witness Traina had, prior to the filing of the pending information, appeared before the county solicitor in an official investigation, inquisitorial in nature, where the said solicitor was acting in effect as a one-man grand jury determining whether to file the pending information against petitioner. That said witness had testified before the solicitor to matters material to and covering and touching on the subject matter of his testimony in chief, and that said testimony was taken down stenographically and transcribed, and was then in the possession of the solicitor, his assistants, reporters, secretaries, or other employees. That petitioner had been informed by some people who had talked to the witness, Traina, subsequent to his giving testimony before the solicitor and prior to his testimony at the trial, that Traina had said in effect that the testimony he gave the solicitor and the testimony he would give at the trial would be different and in conflict. That it was essential to the administration of justice and in order that the petitioner may be enabled to properly cross-examine the witness Traina and to lay the proper predicate for impeachment of the said witness, in the event his statement before the solicitor was in fact substantially in conflict with his trial testimony, that he have said testimony. That the denial of said application would deprive the petitioner of his rights secured under Section 11 of the Declaration of Rights to the Florida Constitution to have compulsory process for the attendance of witnesses in his favor, as well as his rights to due process of law and equal protection of the law as guaranteed and protected by the Fourteenth Amendment to the Federal Constitution.

The record shows no denial, traverse or other challenge to the sworn application for the subpoena. The application was denied by the trial judge. An appeal was taken to the circuit court which affirmed the criminal court of record. It is to this order of the circuit court that the petition for certiorari is directed.

The respondent questions the power of this court to review the decision of the circuit court sitting as an appellate court because of the limited nature and scope of common law certiorari and cites the case of Benton v State, 74 Fla. 30, 76 So. 341, as authority for its contention.

We have reviewed the decision of the Supreme Court in Benton v. State, supra, which is a splendid discussion on the limitation of appellate review by a superior court through common law certiorari. The Court, in its opinion, states:

> "It is sought by this proceeding to have this court review the evidence taken before the county judge and determine its sufficiency to support the verdict, and in doing that to first determine whether certain evidence offered by the state and admitted over the defendant's objection was admissible, and, if we find that it was not, then to quash the proceedings before the circuit court, which affirmed the judgment of the county judge, as being illegal. To do this would be to confound the supervisory power of this court with its appellate jurisdiction.
>
> "It appears from the record that the county judge had jurisdiction of the offense and the person of the defendant, and that the circuit court as the court of final appellate jurisdiction acquired jurisdiction in accordance with the forms prescribed by law, and acted within the limits of its jurisdiction and powers; and, no question being raised as to the validity of the act under which the prosecu-

tion was held, the proceedings of the circuit court appear to be legal, and the writ should be quashed, because in this proceeding this court has no power to inquire into the alleged error committed in admitting certain evidence—that is to say, no power to question the correctness of the judgment on its merits. It is therefore ordered that the writ of certiorari be and the same is hereby quashed."

In Mathews v. Metropolitan Life Insurance Co., Fla. 1956, 89 So. 2d 641, it is stated that the duty of the trial judge to apply a correct principle of law to admitted facts is such a fundamental and essential element of the judicial processes that a litigant cannot be said to have had the "remedy by due course of law" guaranteed by DR §4 if he fails or refuses to perform that duty.

In State v. Staley, Fla. App. 1957, 97 So. 2d 147, this Court held that on certiorari the court could remedy the erroneous application of correct principles of law to admitted facts. And in Martin v. Powell, Fla. App. 1958, 101 So. 2d 610, it was held that where the doctrine of res ipsa loquitur was incorrectly applied the resulting judgment was illegal and could be quashed on certiorari.

The petitioner in the instant case contends that his constitutional rights were infringed by the refusal of the judge of the criminal court to permit him to subpoena the notes of the reporter in order to obtain the testimony of the state's principal witness where he had appeared before the county solicitor and testified for the purpose of determining whether or not an information should be filed against the defendant for the purpose of cross-examining this witness to see if there were contradictory statements made in the sought tes-

timony and the testimony of the said witness on the trial. *We hold that under the stated question we would have power under common law certiorari to review the record to determine if the constitutional rights of the defendant have been violated.*

The Supreme Court of Florida in the case of Trafficante v. State, 1957, 92 So. 2d 811, held that the defendant's sworn application for subpoena duces tecum to obtain the transcript of the testimony which state witness had given before the grand jury, set up materiality of evidence sought to be reached by subpoena, application would be taken, for purpose of appeal involving alleged error in denial by trial court of application and offer of proof, as proving materiality to extent necessary to warrant examination of transcript by trial court with view to making final determination of its materiality, and that the refusal of the trial judge to permit the same was error.

Under the law in Florida, the solicitor of the criminal court of record has power to file a direct information if he chooses. As an alternate procedure, the state's attorney can bring a witness before the grand jury and have the grand jury file an indictment against the defendant, which in turn can be certified by the circuit judge to the criminal court of record for trial. From the indictment so transferred, the county solicitor can then file an information.

In the case of Trafficante v. State, supra, the Supreme Court said:

> "Later, at the trial, when the witness Dietrich was tendered to defense counsel for cross-examination, appellants presented to the court a sworn application for subpoena duces tecum to be directed to

the official court reporter. This application set out that the official reporter had reported and transcribed the witness Dietrich's testimony before the grand jury, and that said testimony was material and relevant to, and in conflict with, the testimony of this witness given on direct examination at the trial. Appellants offered to prove these facts. The application and offer of proof were denied by the trial court.

"Appellants contend that they had a right to the issuance of the subpoena duces tecum to compel the court reporter to appear as a defense witness and to bring with her the transcript of the witness Dietrich's testimony as given before the grand jury, making same available to defense counsel in order that it might be utilized in cross-examination of the witness Dietrich. In support of their contention, appellants rely upon our opinions in Vann v. State, Fla., 85 So. 2d 133, and State ex rel. Brown v. Dewell, 123 Fla. 785, 167 So. 687, as well as the case of United States v. Aaron Burr, Fed. Cas. No. 14,692d. They also contend that they were denied their rights under the 14th Amendment to the Federal Constitution and Section 11 of the Declaration of Rights of the Florida Constitution, F.S.A., the latter of which provides that in all criminal prosecutions the accused 'shall * * * have compulsory process for the attendance of witnesses in his favor.' The State contends, however, that these authorities do not compel the result sought by appellants because, in the State's view, the witness Dietrich's testimony before the grand jury was not material to the issues in this case, and the grand jury presentment or findings had not been made public at the time of trial.

"We cannot accept the contention of the State herein. Appellants' sworn application for the subpoena, as we have stated, sets up the materiality of the evidence sought to be reached by the subpoena and must be taken for the purpose of this appeal as

proving materiality to the extent necessary to warrant examination of the transcript by the court with a view to making final determination of its materiality. See Vann v. State, supra, 85 So. 2d 133, and Coco v. State, Fla. 62 So. 2d 892. Moreover, the record abounds with evidence that the grand jury had returned its presentment and made its finding public prior to the trial of this cause."

The Supreme Court of Florida, in State ex rel Brown v. Dewell, 123 Fla. 785, 167 So. 687, stated that testimony given by a witness before a grand jury may be subpoenaed by the accused after a proper showing was made during the trial that the witness is giving contradictory testimony concerning the same transaction to which he testified before the grand jury. The Court further stated that this holding did not mean the trial judge should order turned over to the defendant's counsel memoranda belonging to and in the possession of the state's attorney for the purpose of enabling the defendant to prepare his defense or impeach state witnesses.

The respondent herein cites McAden v. State, 155 Fla. 523, 21 So. 2d 33, as controlling on the issue in this case. The McAden case involved an indictment for murder. Pearl McAden was indicted by a grand jury. He was placed on trial and convicted of murder in the second degree. Prior to the trial McAden's counsel attempted to procure through the use of subpoena duces tecum a transcript of the testimony of certain witnesses given "at all hearings and investigations had between January 15 and February 1, 1944." These hearings were held in the city hall of Tampa and the county jail of Hillsborough County. His motion was denied by the trial court and he entered an appeal to the Supreme Court of Florida. The Supreme Court affirmed the trial court stating, "we are not familiar with any

statute or rule of law making it the duty of a State Attorney or his assistants to deliver to counsel for defendant a transcript of testimony of state witnesses taken or made at a conference had or held between the State Attorney and assistants and the State's witnesses, nor can counsel for defendant in a criminal case be required to deliver to the State Attorney a transcript of the testimony of witnesses for the defendant made at a conference between defendant's witnesses and his counsel." This principle is undisputed and is supported by many cases of this and other jurisdictions. It is to be noted, however, that in the McAden case the testimony sought was part of the work product of the State's Attorney made prior to the grand jury proceeding. The Court pointed out in the opinion:

> "It is not clear from the petition that the named witnesses appeared before the State Attorney and associates pursuant to subpoenas ad testificandum or that either of the witnesses were examined in the hearings after the administration of an oath."

In the case of Johns v. State, 157 Fla. 18, 24 So. 2d 708, the Supreme Court stated that the ruling of the McAden case would be controlling as the Johns case also involved a motion by the accused for a subpoena duces tecum directing the State's Attorney to turn over notes and testimony taken prior to the grand jury indicting the accused. The Court stated that McAden v. State, supra, is decisive of this phase of the appeal.

In the case of McIntosh v. State. Fla. 192 So. 183, the Supreme Court granted a rehearing after reversing the lower court for refusal of the plaintiff's request to have a subpoena duces tecum issued and on rehearing the Court stated:

"In our opinion filed August 1, 1939, we reversed the judgment below on authority of State ex rel. Brown v. Dewell, 123 Fla. 785, 167 So. 687. On rehearing, it is urged that said judgment of reversal was erroneous because the facts in this case do not bring it within the rule in State ex rel. Brown v. Dewell, supra.

"In State ex rel. Brown v. Dewell, the application was to require production at the trial of testimony taken before the grand jury; the application was seasonably made and the record sought was one made in orderly court procedure. In other words, the matter sought was a legal record made by the official court reporter under direction of the court while, in the case at bar, *the motion would indicate that the record required to be produced was in part from the private files of the County Solicitor and in part an official one made in due course.*

* * * *

"It extends only to legal or public records that have been regularly made in due course of legal procedure and as to these, the application must be seasonably made. Not only that but it must be shown that the evidence sought is material and necessary to the defendant's cause. It in no sense reaches notes or evidence taken by the prosecuting officer at his expense and by his private stenographer. These are the private property of the solicitor. Motions of this kind made after the trial has commenced come too late and should be denied."

In McAden v. State, supra, the Court pointing out that the transcript sought did not cover the testimony given at a judicial proceeding and stating:

"It is not here contended that the testimony of the above-named witnesses was given either before a grand jury or a magistrate, but only before the official court reporter of the Circuit Court of Hillsborough County in the presence of the State Attorney, Assistant State Attorney and Special Assistant State Attorney. * * *"

In Smith v. State, Fla. 1957, 95 So. 2d 525, the Supreme Court held that the transcript of witnesses' testimony that was taken before the State's Attorney who had used the transcript for the purpose of impeaching witnesses should have been given to defense counsel for use during the trial.

In Lindberg, et al v. State, 134 Fla. 786, 184 So. 662, the Supreme Court of Florida stated at page 664:

> "The record shows that the State's Attorney had conducted an investigation of this homicide and in doing this he had a stenographer to take and transcribe the statements of the witnesses. On cross examination of witnesses for the State in cases where the witnesses did not testify at the trial as they had testified during the investigation, the State's Attorney, as a basis for impeachment, asked the witness under interrogation whether or not he had made a contradictory statement during the investigation and quoted from the stenographic transcript what purported to be the contradictory statement of the witness made during the investigation and where a witness denied having made such contradictory statement, the original statement might have been proved by the stenographer who took and transcribed the original statement.
>
> "It is not shown that the transcribed testimony referred to was in any manner a court record.
>
> "There was no attempt to introduce the transcribed statements as substantive evidence. They were simply used as memoranda to promote accuracy. So far as the record shows, the transcript involved was the private memoranda of the State's Attorney. It amounted to no more than the private memoranda made by counsel for either party on a pre-trial examination of witnesses who would likely be called to testify at the trial. It is the right of counsel to make or have made memoranda of the statements

of those who will probably be witnesses at a trial and to use that memoranda both to refresh his memory and for the purpose of impeachment, if the memoranda should become useful for that purpose, although the memorandum itself is not admissible as substantive evidence against the accused. See State v. Rhodes, 81 Ohio St. 397, 91 N.E. 186, 27 L.R.A., N.S., 558, 18 Ann. Cas. 415; see, also, Havenor v. State, 125 Wis. 444, 104 N.W. 116, 4 Ann Cas. 1052; People v. Fuski, 49 Cal. App. 4, 192 P. 552; Metzler et al. v. U. S., 9 Cir., 64 F. 2d 203."

The petitioner, in the splendid brief prepared by his counsel, states on page 7:

"At the outset, in order to clear the air of the confusion which surrounded this case in the Circuit Court, it might be well to state what this case is not about. This case does not involve an attempt by petitioner to compel the production of the private work products, memoranda or statement of a witness taken by a Solicitor preparatory for trial. Petitioner concedes, as he always has, that he cannot compel the production of the statement of a witness before the Solicitor which was taken by the Solicitor preparatory to trying his case only, unless said statement is used by the Solicitor in the case.

"What is involved in this case is whether or not a defendant in a criminal case prosecuted in the Criminal Court of Record on an information filed by the Solicitor has a Constitutional right, upon a proper application, to reach the prior official testimony of the witness upon which the charge itself is based, where the defendant has reason to believe that said prior testimony of the witness is in material and substantial conflict with his Trial Court testimony. The fact that the Solicitor, in most cases in the Criminal Court of Record, serves as the indicting agency and also as the prosecutor at the trial, seems to create an air of confusion as to

whether the testimony sought is the work product of the Solicitor or official testimony which is not privileged and which is subject to production where the defendant invokes his Constitutional right to compulsory process."

The record in this case does not disclose that the solicitor used or attempted to use the transcript of the testimony of the witness Traina for any purpose.

The petitioner contends that the prosecution was based upon the information and that the solicitor could not lawfully file an information except upon sworn testimony taken before him, *acting, in effect, as a one-man grand jury,* which testimony the solicitor must certify to under oath to be sufficient, if believed, to sustain the charge.

The judicial history of informations does not bear out the contention of the petitioner that a solicitor may file an information only upon sworn testimony before him or upon an indictment of a grand jury certified to the criminal court.

The case of Anderson v. State, 134 Fla. 290, 183 So. 735, held that the statutes and constitution did not require that an information filed by the solicitor of a criminal court of record should be based solely and exclusively on testimony taken before him. It was contended in the case by the defendant that the only way in which the solicitor of the criminal court of record would be justified in filing an information would be to issue a subpoena directed to the witnesses desired and have the same served by the sheriff; that an oath be administered, and that the testimony so obtained would be the basis for the filing of the information, and that an affidavit made and filed before the Justice of the

Peace would not meet the requirements of the law and, therefore, that the information filed thereon was void ab initio. In objection to this contention, the Supreme Court said:

> "It will be observed that Section 8257, C.G.L., provides that the method of prosecutions in a Criminal Court of Record shall be upon information filed by the County Solicitor under oath, and the form of the oath to be administered to said officer is likewise provided for by the said statute. We are unable to read into these constitutional provisions, supra, or statutes controlling the subject, or the previous decisions of this court, the requirements, that the information so filed by a solicitor of the Criminal Court of Record *shall be based solely and exclusively upon the testimony taken before him.* Such a construction thereof is not warranted, nor justified by any reasonable inferences drawn therefrom. We have not overlooked the provisions of Sections 8259, 8260, and 8261, C.G.L."

In Bryan v. State, 41 Fla. 643, 26 So. 1022, the Supreme Court said:

> " * * * The twenty-eighth section of article 5 of the constitution provides, in reference to criminal courts of record, that: 'All offenses triable in said court shall be prosecuted upon information under oath, to be filed by the prosecuting attorney, but the grand jury of the circuit court for the county in which said criminal court is held may indict for offenses triable in the criminal court. Upon the finding of such indictment the circuit judge shall commit or bail the accused for trial in the criminal court, which trial shall be upon information.' A form of oath to be made by the prosecuting attorney and appended to the information is prescribed by statute. We do not understand counsel for plaintiff in error to insist that the form of oath prescribed by the statute is not in compliance

with the requirement of the constitution that the prosecution must be by information under oath, but the contention is that the prosecuting attorney, though he signed an affidavit in the form prescribed by statute, yet he did not in fact make any oath to it, and, probably, further, that the failure of the officer signing the jurat to designate the court of which he was clerk vitiated the affidavit. We are of the opinion that defendant must be held to have waived whatever of defect there may have existed in the affidavit appended to the information. *The requirement that the information must be under oath is to secure good faith on the part of the prosecuting officer, and the authorities seem to hold generally, under requirements that the information must be sworn to, that an accused must object to a defective affidavit before going to trial, or at least, before verdict.* . . . We quote from the opinion in Hammond v. State, 3 Wash. 171, 28 Pac. 334, as follows: ' * * * The only object of the verification is to insure good faith in instituting the proceedings. It bears the same relation to an information in a criminal action that it does in a complaint in a civil action. It is no substantial part of either the one or the other, and we see no reason why it may not be waived without prejudice to any substantial right of the defendant, or why he should not be held to have waived any irregularity or defect therein by not objecting before pleading to the merits.' (Citations omitted.) The failure to swear to the information would undoubtedly cause an abatement of the prosecution on proper showing before trial, but defendant entered the plea of not guilty, and raised no objection to the information or the affidavit attached until after verdict, and then by motion in arrest of judgment and for new trial." (Emphasis ours.)

In State v. Coleman, 137 Fla. 177, 187 So. 696, the Supreme Court held that an information need not be based solely upon testimony taken before the county solicitor.

In Kurtz v. State, 26 Fla. 351, 7 So. 869, the Supreme Court said:

> "The third assignment of error is 'that the information herein is not sworn to as required by law.' "Article 5, §28, Const. 1885, provides: 'All offenses triable in said (criminal) court shall be prosecuted upon information under oath.' Chapter 3731, §13, Laws 1887, prescribed the following oath to be made by the county solicitor to informations filed by him, to-wit: 'Personally appeared before me ————, county solicitor, who, being first duly sworn, says, that the allegations as set forth in the foregoing information are based upon facts that have been sworn to as true, and which, if true, would constitute the offense therein charged.' The affidavit of the county solicitor to the information in the case under consideration is strictly in conformity with that prescribed by the statute, and in our opinion it is in conformity with the requirements of article 5 of the constitution. *Certainly the framers of the constitution never intended that the county solicitor should swear to such informations upon his own knowledge. Under this article of the constitution the legislature has prescribed the practice in the county criminal courts of record, and, among other things, the form of the oath to be taken by the county solicitors, which form has been followed in this case, and we can see no force in the contention that said oath is not in conformity with the constitution and the statute.*" (Emphasis ours.)

The Supreme Court held in Spencer v. Gomez, 114 Fla. 688, 154 So. 858, that the constitution requires an information of the criminal court of record to be filed. The Court, in its opinion saying:

> "Thus it appears that it is essential to the validity of an indictment that it shall be presented or re-

turned in open court. And thus the custody of the indictment and all further power over it, passes from the grand jury to the court. After presentment, the grand jury cannot reconsider and withdraw an indictment. 31 C.J. 587. Now, in cases triable in the criminal courts of record, informations take the place of indictments, and are largely governed by the same rules of practice. Applying this principle of procedure, it would seem that the filing of an information with the clerk by the county solicitor would also require an actual and real transfer of custody from the prosecuting officer to the court, or to its clerk acting for the court as the custodian of its records, and that each information so filed should be lodged with and left in the custody of the clerk, whose duty under the statute it then becomes to docket each case, and issue all necessary process, within a reasonable time. This was the conclusion reached in our recent case of Gomez v. Spencer. See 151 So. 395, at page 397, citing King v. State, 17 Fla. 183; Sims v. State, 26 Fla. 97, 7 So. 374, 376; 31 C.J. 636.

" • • • •

" • • • But it is just as essential, under our Constitution and statutes, that an information be *duly and actually filed by being lodged in the custody of the court* in order to make it a valid information as it is that an indictment must be *presented* by a grand jury *in open court* in order to make it a valid indictment . . . ."

We are of the opinion that the proceedings involving statements of witnesses taken before the Solicitor of the Criminal Court of Record *are not official documents* or *judicial functions as involved in this case but are in effect the work product of the officer and not similar evidence before a grand jury.* Therefore, the petition for certiorari is denied.

KANNER, C. J., and SHANNON, J., CONCUR.

PETITION FOR REHEARING

TO THE DISTRICT COURT OF APPEAL, SECOND DISTRICT, STATE OF FLORIDA:

Petitioner, JOE BEDAMI, files this, his Petition for Rehearing, respectfully requesting this Honorable Court to reconsider its opinion filed on April 29th, 1959, denying petitioner's Petition for Writ of Certiorari, and grant unto petitioner a rehearing in said cause, and for grounds for said rehearing, respectfully shows unto the Court as follows:

1. *This Court, in its opinion, decided this cause adversely to petitioner on an erroneous construction of the factual record before the Court,* finding in effect that the testimony sought to be compelled by petitioner's subpoena duces tecum was not "official documents" or taken by the Solicitor at a "judicial function" but that the same was the private work product of the Solicitor, in preparation of his case for trial, and was not similiar to evidence taken before the grand jury. See pages 10 and 13 of the Court's opinion of April 29th, 1959, wherein this Court said:

> "The petitioner contends that the prosecution was based upon the information and that the Solicitor could not lawfully file an information except upon sworn testimony taken before him, acting, in effect, as a one-man grand jury, which testimony the Solicitor must certify to, under oath, to be sufficient, if believed, to sustain the charge.
>
> "The judicial history of informations do not bear out the contention of the petitioner that a Solicitor may file an information only upon sworn testimony before him or upon an indictment of a grand jury certified to the Criminal Court.

"* * * We are of the opinion that the proceedings involving statements of witnesses taken before the Solicitor of the Criminal Court of Record are not official documents or judicial functions as involved in this case but are, in effect, the work product of the officer and not similar to evidence before a grand jury.

"Therefore, the Petition for Certiorari is denied."

In reaching this erroneous factual conclusion, the Court inadvertently overlooked the fact that the legal question is not whether or not it is possible for the Solicitor to file an information on a basis other than testimony sworn to before him or an indictment of a grand jury, but the question is whether or not, in the instant case, the testimony sought to be compelled to be produced was in fact taken before the Solicitor, under oath, as a foundation or part of the foundation for filing his information.

In arriving at this erroneous conclusion of fact upon the record, this Court overlooked and failed to consider that petitioner's Application for Subpoena Duces Tecum set up, under oath, in affirmative terms, that the testimony sought to be reached by the subpoena duces tecum of petitioner was in fact taken before the Solicitor in his official investigation, inquisitorial in nature, when he was determining whether or not the charges embraced in the pending information should be filed against this petitioner. See pages 1 and 2 of this Court's opinion, wherein this Court expressly found from the record before it that petitioner's Application for Subpoena set out, in substance:

"That the witness Traina had, prior to the filing of the pending information, appeared before

> the County Solicitor in an official investigation, inquisitorial in nature, where the said Solicitor was acting in effect as a one-man grand jury determining whether to file the pending information against petitioner. That said witness had testified before the Solicitor to matters material to and covering and touching on the subject matter of his testimony in chief, and that said testimony was taken down stenographically and transcribed, and was then in the possession of the Solicitor, his assistants, reporters, secretaries, or other employees. * * * "

The Court also overlooked and failed to consider the fact that the record before the Court discloses this affirmative showing that the testimony of the witness Traina sought to be reached by petitioner's subpoena was in fact given before the Solicitor in his official investigation as a part of the foundation of the filing of the information against petitioner, was not denied, traversed or challenged in any manner, and that, therefore, said showing must be taken on review as true. See page 2 of this Court's opinion of April 29th, 1959, where the following statement by this Honorable Court appears:

> "The record shows no denial, traverse, or other challenge to the sworn application for the subpoena. * * * "

In reaching this erroneous conclusion of fact on the record before it, this Court overlooked and failed to consider the sworn testimony of the witness Traina, whose testimony before the Solicitor petitioner's subpoena sought to reach, as follows (Tr. 159-160, App. 9-10) ·

"Q Now, Mr. Traina, *were you subpoenaed* to the County Solicitor's office *on April 18, 1957, to give testimony?*

"A Yes, sir.

"Q All right, were you *subpoenaed again* to appear *on July 9, 1957?*

"A I think I was.

"Q *Now, just before your second appearance in the office of the County Solicitor and after you had already testified to us under oath in April,* did you have a phone call from Joe Bedami?

"A Yes, sir."—(Emphasis Supplied)

So that this Court overlooked and failed to consider the above quoted portions of the witness Traina's testimony in answer to the County Solicitor's own questions, which shows conclusively that the witness was *subpoenaed* and did appear in the County Solicitor's office and give *sworn testimony* on the two days alleged in petitioner's Application for Subpoena Duces Tecum.

Under this affirmative showing that the witness did appear subject to subpoena and did give sworn testimony on the dates alleged, and further that when he did appear, the Solicitor was then acting as a one-man grand jury in his inquisitorial capacity to determine whether or not the charges against petitioner should be filed, the Court is wholly unjustified in finding that the testimony sought to be produced was merely the work product of the County Solicitor and not similar to evidence before a grand jury. Especially is this

true in the absence of any showing of any kind that the Solicitor's information is based upon any grand jury indictment or on any sworn testimony taken before a committing Magistrate or other official duly authorized to administer an oath.

It therefore follows that the Court's holding is based upon a erroneous construction of the record and conclusion of fact The record shows that in fact, the testimony sought to be compelled by petitioner's Application for Subpoena Duces Tecum was in fact taken before the Solicitor, under the processes of the Court, to-wit, under subpoena, when the Solicitor was discharging his semi-jurisdicial function, which he is lawfully authorized and directed to perform, sitting, in effect, as a one-man grand jury, conducting an inquisitorial investigation to determine whether or not criminal charges should be filed against the petitioner, and that, therefore, the testimony sought to be produced is precisely similar to and in the same legal position as evidence of a witness before a grand jury.

It therefore follows that the cases cited in petitioner's brief, to-wit: State ex rel. Brown v. Dewell, 133 Fla. 785, 167 So. 687; Trafficante v. State, 92 So. 2d 806; Trafficante v. State, 92 So. 2d 811; United States v. Aaron Burr, Fed Cas. No. 14,692d; Vann v. State, 85 So. 2d 133, and Section 11 of the Declaration of Rights of the Florida Constitution, and the due process clause and equal protection clause of the 14th Amendment to the Federal Constitution, are directly controlling of the instant case and compel a reversal thereof.

In denying petitioner's Petition for Certiorari, this Court overlooked and failed to consider the fundamental law that the failure of the Trial Judge to apply a correct principle of law to an admitted state of facts deprives the litigant of "remedy by due course of law" or "due process of law" which terms the Courts hold to be synonymous. As seen above, the facts forming the foundation for the issuance of the subpoena duces tecum applied for by petitioner stand admitted, untraversed and unchallenged. Under this condition it follows that the Trial Court's failure to apply the law as laid down by the Brown, Trafficante, Burr and Vann cases, above cited, denied this petitioner "remedy by due course of law" and equal protection of the law and due process of law as guaranteed and protected by the Florida Constitution and the 14th Amendment to the Federal Constitution. See page 3 of this Court's opinion of April 29th, 1959, wherein this Court said:

> "In Mathews v. Metropolitan Life Insurance Co., Florida, 1956, 89 So, 2nd 641, it is stated that the duty of the Trial Judge to apply a correct principle of law to admitted facts is such a fundamental and essential element of the judicial processes that a litigant cannot be said to have had the 'remedy by due course of law' guaranteed by D.R. Section 4, if he fails or refuses to perform that duty."

It therefore follows, as night follows the day, that the Trial Court's denial of petitioner's Application for Subpoena Duces Tecum, and the Circuit Court's affirmance of said denial, and this Court's denial of petitioner's Petition for Certiorari, under the admitted and uncontradicted facts disclosed by the record, are all in derogation of petitioner's rights under Sections 4 and 11 of the Declaration of Rights to the Florida Con-

stitution, his right to compulsory process under the 6th Amendment to the Federal Constitution, and his right to due process of law and equal protection of the law as guaranteed and protected by the 14th Amendment to the Federal Constitution.

WHEREFORE, petitioner respectfully prays this Honorable Court will reconsider its decision and opinion of April 29th, 1959, in the above styled cause, and on said reconsideration will grant unto petitioner a rehearing and his Petition for Writ of Certiorari, as prayed.

Respectfully submitted

HAWES & RAGANO

By

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Tampa 2, Florida

Attorneys for Petitioner.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Petition for Rehearing has been furnished to the Honorable Richard W. Ervin, Attorney General of Florida, Capitol Building, Tallahassee, Florida, by mail, this the 14th day of May, A.D. 1959.

Counsel.

ORDER DENYING PETITION

Counsel for petitioner having filed in this cause a Petition for Rehearing and the same having been considered by the Court, it is

ORDERED that the said petition be and the same is hereby denied.

APPLICATION FOR STAY OF MANDATE

Comes now the petitioner, JOE BEDAMI, by and through his undersigned counsel, and moves the Court, in the event that his Petition for Rehearing is denied, to enter an order staying its mandate to enable petitioner to make application for, and to secure if he can, the issuance of a Petition for Certiorari from the United States Supreme Court to review the judgment and decision of this Court, and for grounds for said application respectfully shows unto the Court as follows:

1. This Court has rendered its judgment and decision denying petitioner's Petition for Writ of Certiorari, which will have the effect of remanding the petitioner to the custody of the proper authorities to begin serving the sentence which has been imposed upon him, in the event this Court denies his Petition for Rehearing.

2. That petitioner and his counsel verily believe that petitioner has been deprived of compulsory process for the attendance of his witnesses, in derogation of his rights under Section 11 of the Declaration of Rights of the Florida Constitution and his rights to compulsory process under the 6th Amendment to the Federal Constitution, as well as his rights to due process of law and equal protection of law as guaranteed and protected

by the 14th Amendment to the Federal Constitution. That it is the settled purpose of petitioner and his counsel to expeditiously prepare and present to the United States Supreme Court a Petition for Certiorari to review the judgment and decision of this Court remanding him to the custody of the proper authorities as aforesaid. That the grounds of petitioner's Petition for Certiorari in the United States Supreme Court will be a denial of petitioner's right to compulsory process for the attendance of the witnesses in his behalf by denying petitioner's Application for Subpoena Duces Tecum to compel the attendance of a witness in his favor and the production of stenographic notes and a transcription thereof, of a statement, under oath, made by the State witness, Angelo Traina, upon whose testimony the State relied heavily for conviction, when the application for subpoena and the witness's testimony disclosed that said witness had made a prior statement, under oath; that said statement was material to and concerning the matters about which said witness testified for the State in chief, and that petitioner had been informed and believed that said prior statement was different from and in material conflict with the testimony said witness gave at the trial, and thereby denied petitioner compulsory process for the attendance of his witnesses, in derogation of his rights under Section 11 of the Declaration of Rights of the Florida Constitution and his rights to compulsory process under the 6th Amendment to the Federal Constitution, and his right to due process of law and equal protection of law as guaranteed and protected by the 14th Amendment to the Federal Constitution.

3. That this Court's judgment and decision has determined a Federal question, as shown by a reading of page 2 of this Court's opinion, in conflict with the

applicable decision of the United States Supreme Court as laid down in the case of United States v. Aaron Burr, Fed. Cas. No. 14,692d and the decisions of the Supreme Court of Florida as laid down in the cases of Vann v. State, 85 So. 2d 133; State ex rel. Brown v. Dewell, 133 Fla. 785, 167 So. 687, and the case of Trafficante v. State, 92 So. 2d 811.

4. That this Court in rendering its judgment and decision, has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of the Supreme Court of the United States' power of supervision.

5. That petitioner will, if this Court grants this application for stay, hold himself available to respond to the mandate of this Court on the final decision of this cause.

6. That this application is made in the utmost of good faith and not for the purpose of delay, and in the opinion of petitioner and his counsel, petitioner's Petition for Certiorari, which will be presented to the Supreme Court of the United States, contains merit.

WHEREFORE, petitioner respectfully moves this Court to enter its order staying its mandate for the time prescribed by law for him to make application to the Supreme Court of the United States for Certiorari, and so long thereafter as is required for a final determination of said Petition for Certiorari by the Supreme Court of the United States.

Respectfully submitted

HAWES & RAGANO

By /s/ FRANK RAGANO
308 Tampa St., Tampa, Florida

Attorneys for Petitioner.

CERTIFICATE OF GOOD FAITH

I HEREBY CERTIFY that the matters set out in the above and foregoing Application for Stay of Mandate are true and correct, and that said application is filed in good faith and not for the purpose of delay, and that in my judgment, the Petition for Certiorari to be presented to the Supreme Court of the United States on petitioner's behalf is well founded in fact and in law.

HAWES & RAGANO

By /s/ FRANK RAGANO

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Application for Stay of Mandate has been furnished to the Honorable Richard W. Ervin, Attorney General of Florida, by mail, to his office at Tallahassee, Florida, this the 14th day of May, A.D. 1959.

/s/ FRANK RAGANO

Counsel.

ORDER GRANTING APPLICATION

Upon consideration of the application of petitioner, it is

ORDERED that the effect of the order entered in the above cause on April 29, 1959 denying petition for writ of certiorari be and it is hereby stayed for ninety (90) days from June 1, 1959, to enable the petitioner to petition the Supreme Court of the United States for and to obtain, if he can, a writ of certiorari.

This order is subject to cancellation at any time if petitioner fails to prosecute certiorari proceedings in the Supreme Court of the United States with reasonable dispatch.

APPENDIX "B"

32.18 Method of prosecution; rules of pleading and practice.—

(1) All offenses triable in the criminal courts of record shall be prosecuted upon information under oath, to be filed by the County Solicitor.

(2) The grand jury of the circuit court for the county in which a criminal court of record is established may indict for offenses triable in the criminal court of record.

(3) Upon the finding of such indictment, the circuit judge shall commit or bail the accused for trial in the criminal court of record, which trial shall be upon information filed by the county solicitor.

(4) Upon the finding of such indictment, the circuit judge, or the clerk of the circuit court upon direction of the circuit judge, shall certify such indictment and deliver the same to the Clerk of the criminal court of record or to the county solicitor. Such indictment shall be sufficient basis for the filing of an information by the county solicitor.

SECTION 4. Courts open to everyone; remedy for wrongs.—All courts in this state shall be open, so that every person for any injury done him in his lands, goods, person or reputation shall have remedy, by due course of law, and right and justice shall be administered without sale, denial or delay.

SECTION 11. Rights of accused; speedy trial; etc.—In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury, in the county where the crime was committed, and shall be heard by himself, or counsel, or both, to demand the nature and cause of the accusation against him, to meet the witnesses against him face to face, and have compulsory process for the attendance of witnesses in his favor, and shall be furnished with a copy of the indictment against him.